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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1603

CATHERINE A. DAUGHERTY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF., a municipal corporation, and STATE OF CALIFORNIA,

Respondents.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The brief filed jointly by Long Beach and the State of California refuses to come to grips with the central issue in this case: the unconstitutionality of suddenly and drastically altering rules of property, and then retroactively applying the rules so as to confiscate private property for public use without the payment of any compensation, and without the possibility of a hearing which comports with due process.

This Court's assistance is needed to

correct a massive injustice to hundreds or thousands of property owners in California. If not halted, this unfairness is likely to be followed by other states because of the lure of getting "something for nothing." The stability of property ownership is threatened - and that threat endangers the stability of government itself. California's recent experience with Proposition 13, was caused as much by adverse reaction to a multitude of government games played with property owners (the Gion-Dietz decision, the Coastal Commission, zoning rollbacks, building moratoria) as it was by property taxes.

HOW CAN LONG BEACH AND THE STATE CONTEND WITH A STRAIGHT FACE THAT GION-DIETZ WAS NOT A REVOLUTIONARY DECISION?

The one thing about this case that one would have assumed to be stipulated is that Gion-Dietz worked a radical change in the law.

The trial court thought so:

> "THE COURT: Before you leave that, if I can interrupt, instead of rehashing it at some later time, we had for

> the first time in what? 1971? A rule of law enunciated in this state by the Supreme Court with reference at least to recreational easements, took the whole [legal] profession [by surprise], admittedly, and even the City Attorney prosecuting this case, because up to that point they were paying valuable money, thought they were doing it because they had to for these very rights." [RT 549]

So did the late Assistant Attorney General of California, Jay Shavelson, who headed the Attorney General's office in charge of property matters. Mr. Shavelson, who - before his death - was one of the counsel in Gion-Dietz, had this to say:

> "In February of 1970, an earthquake of major proportions occurred in California real property law. Its tremors have been felt by the Legislature, the bar, private landowners, the land title industry, and the public at large.
>
> "This was the celebrated consolidated action of Gion v. City of Santa Cruz and Dietz v. King.
>
> * * *
>
> "The importance of the case lies in the fact that the Court expressly repudiated the presumption of earlier decisions that public use of unenclosed and uncultivated land was attributable

to a license on the part of the owner, rather than his intent to dedicate. This was said to be particularly true where the user extended over an entire tract, rather than a definite and specified line, so that dedication would practically destroy the value of the property to the owner himself.[3]

"3 Manhattan Beach v. Cortelyou, 10 Cal.2d 653 (1938); Whiteman v. City of San Diego, 184 Cal. 163 (1920); City of San Diego v. Hall, 180 Cal. 165 (1919); F.A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 448 (1915)."

(Shavelson, Gion v. City of Santa Cruz: Where Do We Go From Here? [1972] 47 Cal. St. B. J. 414, 415-416)

The law review staff members from the University of California, UCLA and the University of Southern California, who wrote the analyses quoted at page 18 of the Petition, likewise thought Gion-Dietz radically changed the law.

And yet, in their brief in this Court, Long Beach and the State now urge that Gion-Dietz said nothing new.

This City/State position would seem to call for one of the following conclusions:

• The City and State may be wrong. But if they are wrong - and Gion-Dietz was revolutionary - then it should not have been retroactively applied to events that were governed by different law. Such retroactivity would result in a denial of due process of law (see Pet. 12-21).

• On the other hand, what is the consequence if the City and State are correct, and Gion-Dietz merely reiterated settled law? Then the City and State are barred by laches, estoppel and/or the statute of limitations, from pursuing their claim. The express reason for the trial court's rejection of these defenses was that it would not be fair to penalize the public by insisting that the City and State should have filed this suit before Gion-Dietz, because Gion-Dietz was a radical change in the law. As the trial court expressed it:

> "THE COURT: Before you leave that, if I can interrupt, instead of rehashing it at some later time, we had for the first time in what? 1971? A rule of law enunciated in this state, by the Supreme Court with reference at

least to recreational easements, took the whole [legal] profession [by surprise], admittedly, and even the City Attorney prosecuting this case, because up to that point they were paying valuable money, thought they were doing it because they had to for these very rights.

"Can you now urge laches against someone, an entity who didn't know the law, didn't know it had rights and couldn't avail itself of such rights? Is that a proper argument to bring or proper defense in this posture?" (RT 549 549)

"Here we are concerned that a Gion recreational easement was established in the public prior to 1922. By the same token, before the Gion decision was announced recently (1970), no one knew it existed. Can we then point to any conduct prior to that decision, viz., building permits, zoning, city installations beyond the parcel boundaries, etc., as affecting an abandonment? Implicit in the concept of abandonment is an intellibigle choice of conduct, that is, conduct with some knowledge of the underlying rights. If this is true, how can we say the City (assuming it was so empowered to do) must be deemed to have 'abandoned' easements it didn't even know existed? Even cities can't be chargeable with such prescience." (Appendix D. pp. 5-6)

Mrs. Daugherty believes that Gion-Dietz did radically change the law. But if Long Beach and the State are correct, then reversal is called for because of the inexcusable delay by Long Beach and the State in pursuing remedies under "long-settled" law. Long Beach and the State can't have it both ways.

THE SUGGESTION BY LONG BEACH AND THE STATE THAT CALIFORNIANS SHOULD HAVE IGNORED FOUR DECISIONS OF THE CALIFORNIA SUPREME COURT IS HARD TO FATHOM

In her Petition, Mrs. Daugherty noted that, before Gion-Dietz, the California Supreme Court created a line of authority which held that undeveloped, unfenced land (particularly, a beach) could not be held to be impliedly dedicated under circumstances like those at bench:

F. A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436, 150 Pac. 62;

City of San Diego v. Hall (1919) 180 Cal. 165, 179 Pac. 889;

Whiteman v. City of San Diego (1920) 184 Cal. 163, 193 Pac. 98;

Mahnattan Beach v. Cortelyou (1938)
10 Cal.2d 653, 76 P.2d 483.

These cases were decided during the time the easements at bench were purportedly being acquired.

The City/State response? These cases should have been ignored! In their words:

> "Petitioner is not justified in relying on the Hihn Case." (Br. in Opp., p. 11)

The arguments made by Long Beach and the State fail to sustain this startling proposition.

First, they assert, the language in Hihn relied on by Mrs. Daugherty is ". . . pure dictum." (Br. in Opp., p. 11) There are two responses:

- The California Supreme Court's rule on the use of "dictum" was probably best expressed in Adams v. Seaman (1890) 82 Cal. 636, 638-639. In response to a charge that some of its language in an earlier case was unnecessary to the

decision, the Court said:

> "This is true; but as the point appears to have been quite elaborately considered, and as the opinion was concurred in by the whole court in Bank, what was said is entitled to great weight, if it be not taken as authority in the strict sense . . ."

- In any event, assuming, arguendo, that it was dictum in Hihn, the same language was adopted as the holding in Hall, Whiteman and Cortelyou. The City/State brief ignores those cases.

Second, they say - according to Gion-Dietz - any ". . . confusion . . ." caused by Hihn[1/] was cleared up in O'Banion v. Borba (1948) 32 Cal.2d 146 (Br. in Opp., p. 11). But, as noted in the Petition (p. 20), and not denied by Long Beach and the State, no one was aware of any alteration

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1/ Confusion seems to be in the eye of the beholder. Hihn was not confusing. Nor were Hall, Whiteman and Cortelyou, each of which expressly followed Hihn.

in the Hihn line until Gion-Dietz. Indeed, the O'Banion case could not have cleared up any Hihn-caused ". . . confusion . . .", as O'Banion never ever mentions Hihn or any of its progeny. Until Gion-Dietz, there was no judicial pronouncement that the rule established in Hihn was no longer alive and well.

Third, they say that Hihn involved dedication implied in fact, while this case involves dedication implied in law (Br. in Opp., p. 12). However, a reading of Hihn makes it clear that the Supreme Court was discussing both types of dedication. Furthermore, the Supreme Court's decisions in Hall, Whiteman and Cortelyou involved dedication implied in law as well as in fact.

Finally, they disingenuously assert that Hihn is of no relevance anyway, because this case was tried on the merits, and the trial court found that an easement had been dedicated (Br. in Opp., pp. 12-13). The flaw in that position is

that under Hihn and its progeny, the evidence in this case would not have established the "implied dedication" of a "recreation" easement.

By contrast, under Gion-Dietz, the trial court held that a showing of some use of some part of the eight and a half mile beach in the general vicinity of Mrs. Daugherty's 25 foot wide lot, was sufficient to establish a fictionally "implied intent" by Mrs. Daugherty's predecessors to "dedicate" this tiny parcel to the public. Hihn would never have contenanced that. Mere use of the beach by the public was insufficient to establish a "dedication" under Hihn.

IF LEGISLATIVE ACTION IS NECESSARY FOR AN IMPAIRMENT OF CONTRACTS CLAIM, IT IS PRESENT AT BENCH

As noted in the Petition, California law - at least since the 1915 Hihn decision - assured Mrs. Daugherty that when she executed her land purchase contract in 1961, the property she bought was really hers. It could not have been "impliedly dedicated" by any previous actions of the "public".

Under this Court's decision in Muhlker v. New York & Harlem R.R. (1905) 197 U.S. 544, when Gion-Dietz overturned the Hihn line of cases, Mrs. Daugherty's contract rights were unlawfully impaired.

The City/State position is intriguing. They say that some statute must be involved before Article I, §10 of the United States Constitution may be invoked.

This position is intriguing, because the City/State brief - in order to bolster the Gion-Dietz decision - relies on statutes which undermine the Hihn decision (see Br. in Opp., p. 10, fn. 6).

Thus, if the existence and enforcement of a state statute is necessary, state statutes are present. For example, two of the statutes relied on by the City/State brief (as well as the Gion-Dietz court) are:

California Government Code § 54090:

"As used in this article 'public beach' means any beach area used for recreational purposes which is owned, operated or controlled by the State, any state agency or any local agency."

California Government Code § 54092:

"Any city, county or other local agency which allows any property owned, operated or controlled by it to be used as a means of access to any public beach shall allow free access over such property to all persons regardless of color, race, religion, ancestry, sex, national origin or residence."

It was the enactment of statutes such as these which Long Beach and the State contend formed the justification for Gion-Dietz.

The above-cited statutes were enacted in 1963, after Mrs. Daugherty purchased her home.

Thus, if impairment of contracts requires

legislative action, then legislative action is present. The enforcement of those statutes in Gion-Dietz, by the overruling of Hihn, impaired the obligation of Mrs. Daugherty's land purchase contract. The statute in Muhlker was little more than those quoted above. It merely authorized an existing railroad to be elevated above street level. The New York courts took that occasion to reverse a long-standing line of cases concerning property rights of owners abutting public streets. Likewise, here, the California Supreme Court siezed upon the above statutes as justification for discarding Hihn.

Frankly, however, Mrs. Daugherty suggests that it would make more sense to enforce the substance of Muhlker - which examined the impact on real people of a sudden change in property law - rather than search for a statute lurking in a corner. To be sure, a statute existed in Muhlker. So does one here. But this Court's words in Muhlker represent a sensitivity to the needs and rights of people that merits preservation without the use of such a crutch:

"The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad Cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

"And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, . . ." (Muhlker, 197 U.S. at 570-571.) (Emphasis added.)

CONCLUSION

The unfairness done below is of Constitutional magnitude.

Rules of property were altered and applied in such a way that rights acquired and protected under the old rule were confiscated under the new one. Property owners were given no opportunity to adjust their actions to the new rule. Their property was simply declared, ipso facto, eo instanti, to be "public". Due process rebels at the thought.

Mrs. Daugherty prays that the Petition be granted.

Respectfully submitted,

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